

Farewell to Chief Justice Spigelman

The following speech was delivered by the Hon Justice Allsop on the retirement Chief Justice James Spigelman at a ceremony in the Banco Court, 31 May 2011.



Photo: Courtesy of the Supreme Court of New South Wales.

This sitting of the Supreme Court marks the end of 13 years and 13 days of James Jacob Spigelman in the Office of Chief Justice of the Supreme Court of New South Wales.

I have been asked to tender the apologies of Justices Heydon, Bell, Beazley, Campbell, Whealy, Handley, Hall, Brereton and Rein and the Hon Simon Sheller.

The privilege and honour fall to me to speak about you, chief justice, on this occasion. The fulfilment of that task is made difficult by the shortness of time permitted to me. There is so much that should be said. Most people here know of your extraordinary achievements and service in your life since coming to Australia with your parents from war-torn Europe in 1949 as a small child of three, before coming to the court as its chief justice in 1998. Reference should be made to the speech of the then Attorney, the late JW Shaw for an insight up to 1998. My principal task is to speak of your work on the court.

That undertaking, however, cannot be done adequately without appreciating the features and characteristics which, up to 1998, had marked your life as a brilliant student (double honours in one year in Arts, the Medal in Law, with only a passing acquaintance with the lecture rooms), nascent politician, author, brilliant lawyer and advocate and participant and administrator in so many aspects of this society's cultural and intellectual life and which continued to mark your work as a judge, a leader of this court and a colleague, these features being:

- courage and boldness of approach;
- a huge intelligence and an enormous capacity to express yourself with clarity and pungency;
- a deep sense of justice and a strong antipathy to any form of meanness or bigotry;
- a strong belief in the capacity of our legal system based on the rule of law, rigorous judicial technique and parliamentary democracy to provide a just framework for a healthy, fair and diverse society;
- an international and not provincial outlook, based on a deep appreciation of the widest range of cultural, artistic and social life in society, but an outlook that never lost sight of the essential task of those in public life of serving the people of Australia or of the fact that it is the lives of ordinary people that matter; and
- a consummate political skill (using that phrase in the broadest sense) based on all the above characteristics, made effective by a calm decency and fairness with which you treat everyone.

Your work on the court has been remarkable. I propose to finish, not start, with the judgments you have written in both criminal and civil law. Let me say, however, at the outset, that your work as a jurist in the primary task of crafting judgments has produced one of the finest bodies of judicial work in Australia's legal history. You stand as one of the best judges ever to have served this nation. I use no hyperbole here.

It is first necessary to say something of your work as an administrator of the court. You have managed the court during an important period of change. The *Civil Procedure Act 2005* has brought about important modernisation and reform of procedure in this state. Your energy and perception of the need for cost and time reduction in litigation was instrumental in bringing forward statutory, professional and cultural change. The process had begun in this court in the late 1970s. The Civil Procedure Act took those changes to the level of written law. There remains work to be done, but it was never a one-person task and you played more than one person's role.

Though you have a well-known suspicion of statistics, you have in fact marshalled them to be used wisely in the management of the two divisions and two appeal courts that comprise this court. Your skilled and careful management has been marked by calmness and an intimate grasp of detail. You also have a remarkable skill of perceiving conflict emerging amongst people, defusing it and solving the problem, never letting it lie to fester and arise on a later and more bitter occasion. You do not impose your will, but your choices, always wise, usually prevail.

Underlying this skilful management of the court has been your perception of the need to develop collegiality and congeniality within the court. The carrying on of judicial education and judges' conferences, the latter involving partners of judges attending, has been a feature of this. May I take this opportunity at this point to pay tribute to your wife Alice, who has played such an important part in this process. This has created a happy court in which mutual respect is the pervading social and working ethos. And as you no doubt appreciate, such a milieu tends to promote productivity in judges and to provide a more civil and civilised experience for litigants and the profession than perhaps was the case during some periods in the preceding forty years.

Secondly, this managerial skill has been matched by your skill and acumen in dealing with government and attorneys-general. Your ability to work with them, but maintaining independence from the executive, has led to the healthy working relationship between the courts and the other branches of government, consistent with judicial independence, to the great advantage of the people of New South Wales.

Thirdly, and I exclude myself from this comment, you

have been able to influence critically the appointment of a remarkably talented body of judges. This is a court of international stature and reputation. That is based on that judicial talent. This was a legacy you inherited, which you pass on enhanced.

Fourthly, you have been instrumental in taking the Australian legal system, through this court and its judges, into the Asia Pacific region and the wider world. You understand the importance of the Australian judiciary being recognised around the world for its quality and taking its place in the training of, and engagement with, the judiciary in other countries. This is not an exercise in legal jingoism or judicial hubris or the promotion of judicial holidays. Rather, you recognise that if the Australian legal system does not embrace and engage with counterparts in Asia and the wider world, it, its judges and its practitioners will be left to their life of tranquil provincialism, over time eroding



Photo: Courtesy of the Supreme Court of New South Wales.

the quality of justice administered by them.

To this end, you have been active in developing and strengthening the relationships between the Supreme Court and Chinese courts and judges. Judges from the court have, on an annual basis, taught at the National Judicial College in Beijing. You have recently effected memoranda of understanding with the courts of Hubei and Shanghai to co-operate on judicial exchange.

Similar memoranda of understanding are likely with Guangdong courts and the Chinese National Judicial College. Together with the present chief justice of Hong Kong you began and developed a regional conference of commercial law judges every eighteen months to two years. These meetings have involved

commercial judges from China, Japan, Korea, Hong Kong, Singapore, Malaysia, Thailand, India, Pakistan, Bangladesh, Australia and New Zealand. The next conference is in Singapore. This is now a standing forum for commercial law in the region. You have put in place memoranda of understanding with Singapore and New York courts regarding the proof of foreign law by judicial declaration rather than the use of expert evidence.

As president of the Judicial Commission you have supervised and guided the important work of that body in particular in encouraging and fostering its role as a judicial educator in New South Wales and in many other places in the region and in fostering greater awareness of the issues affecting Indigenous people in this state and the legal system.

You have fostered a regular exchange of judges between the United Kingdom and this country to maintain and broaden the bonds that lie between our two systems.

All this, and I have yet to mention your work as a public intellectual through your many speeches and publications as chief justice since 1998 and as a commandingly great judge.

Your judgments have been outstanding. All crafted with great intellect and remarkable speed.

You have in thirteen years delivered dozens of speeches. All have been of the highest intellectual quality. They range over many topics – history and historical reflections, the rule of law, judicial administration, the legal profession, criminal and civil law, public law, human rights and other issues important to our society. Some, such as your speeches on construction and interpretation of contracts and statutes, have been influential in affecting the law's direction. All have been influential on the profession in this country and wherever jurisprudence in the English language is read.

Your historical works on Beckett and Henry, Bacon and Coke are not only significant historical interpretations in themselves, but they also speak to modern society and those interested in its development. When I read the book on Beckett and Henry some years ago the only comparison I thought appropriate to draw was with



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the work of the great medievalist Professor Richard Southern. The comparisons were clear – his work and yours revealed a simply-expressed grasp of power, law, government, history and humanity. It awaits a further occasion to explore the extent to which these works of history illuminate your work as a great chief justice.

Your judgments have been outstanding. All crafted with great intellect and remarkable speed. They reveal the strongest possible attachment to precedent and legal principle. Never, however, did that see them take the form of gnarled shapes of weatherbeaten rules determined by the ratio decidendi of past cases. Rather, your sense of principle and insightful intelligence always produced a clearly written and elegantly formed piece of work reflecting the common law as it stood by reference to precedent or with incremental change born of contemporary legal policy.

Your judicial technique was founded on a respect for the intellectual labour of others, including colleagues and predecessors and was directed to the creation of coherent legal principle, not merely to the destruction of contrary views or the expungement of error.

Within months of your swearing in you initiated a series of important criminal sentencing judgments. Over the years, this body of work (*Jurisc, Henry, Ponfield, Wong and Leung, Whyte, Attorney-General's Applications No 1, 2 and 3 of 2002*) has had a lasting significance on the law of sentencing.

Numerous other notable decisions on the criminal law reflect your important work on the court. Perhaps your decisions on open justice (*John Fairfax Publications v District Court* as an example) best illustrate your capacity to write commanding and comprehensive judgments

that state the field. Other cases, such as *JW*, reveal not only a consummate command of legal technique, but your humanity towards those unfortunate enough to be the necessary subject of legal technique in criminal law.

You also took the Court of Criminal Appeal to regional centres of New South Wales bringing the work of the court to the people it affected.

Your work in civil law in the Court of Appeal has been similarly influential. You sat over the full range of the court's jurisdiction and have contributed to the jurisprudence of this country in many subjects, administrative law, constitutional law, corporations law, contracts, equity, environment and planning law, evidence, industrial law, contractual and statutory interpretation, private and public international law, real property, torts and workers compensation.

The important series of cases concerning the Industrial Commission and Industrial Court and its jurisdictional relationship with this court, ultimately endorsed by the High Court, are of immense importance to the administration of justice and the resolution, in particular, of commercial disputes in this state.

Your judgments and other writing on statutory interpretation have given penetrating and sure guidance to the principles, as well as explaining the, at times, less than clear expressions of others in the legal firmament on the subject.

Your command of principle and logic allowed you to write the great judgments of *O'Halloran* and *Seltsam* in the fields of equity and common law, both dealing with the questions of causation, now made less intractable by your work, and the illuminating expression of equitable principle in *Rob Evans* on equitable remedies.

This is an entirely inadequate expression of the breadth and quality of your judgment writing.

Your decision to have a welcome to country at the beginning of this sitting reveals that you still recognise, just as you did in 1965, the year of the Freedom Ride, the existence of a foundational issue confronting this society: the just reconciliation of those who have come to this ancient land in the past 223 years, and their descendants, with the original inhabitants who lived here for tens of thousands of years, and their descendants. This is a profound and difficult issue, involving, in part, the recognition that a legal system



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founded on the rule of law and constitutional traditions of centuries must provide a framework of justice, fairness and human dignity for all, so that all may commit their loyalty to the legal system out of respect and consent, not imposition of will of others. These notions, together with those aspects to which I referred earlier, have attended your work and time on the bench.

Australia is an immeasurably better place for your work as a judge, as a leader of this court and as a public intellectual.

On behalf of all judicial officers in this state and those who play their part in the administration of justice, I thank you for your work and time as chief justice of this state.

On behalf of the judges of this court and their partners, I thank you and Alice for all that you have both done in and for the life and well-being of this court.

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